UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

WYNN LAS VEGAS, LLC	**Case No.**	**28-CA-23070**
		JD(SF)-16-11
and		
DAVID A. SACKIN, an Individual		

_____/

RESPONDENT WYNN LAS VEGAS, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE.

This case presents a unique set of circumstances involving the discipline and subsequent layoff of Mr. David Sackin (hereinafter "Sackin"), a casino dealer employee of Wynn Las Vegas, LLC (hereinafter "Wynn" or "Respondent"). For Sackin, the facts surrounding his discipline are clear and uncontroverted. On or about August 21, 2009, Sackin was observed entering Respondent's facility through a guest entrance and running through the retail corridor and then through the casino. Sackin was suspended pending investigation for five (5) days, and subsequently returned to work after receiving a "second written warning" for his infractions.

On or about February 26, 2010, an amended Charge was filed in an earlier and related case, Case No. 28-CA-22818, to include an allegation that Sackin was disciplined for engaging in protected concerted activity in violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (hereinafter "the Act"). Notably, Sackin did not independently file a Charge alleging that his discipline was discriminatory. Rather, his allegation was added to a Charge involving another discriminatee who had been terminated based on an entirely unique set of facts and circumstances unrelated to Sackin. A hearing in Case No. 28-CA-22818 was held before Administrative Law Judge James Kennedy in Las Vegas, Nevada, from May 11, 2010 through May 14, 2010, and June 7, 2010.

On June 15, 2010, which was after the close of the record in Case No. 28-CA-22818, Wynn implemented a company-wide reduction in staff. For its Table Games Department, the criteria for the selection of employees for layoff involved a review of employee discipline. All Table Games Dealers with active discipline were laid off, which included Sackin. On or about June 16, 2010, Sackin filed a Charge alleging that his layoff was in violation of Section 8(a)(3) of the Act. The Charge was amended on August 24, 2010. On December 14, 2010, Judge

Kennedy issued his decision in Case No. 28-CA-22818 finding that the severe level of discipline imposed upon Sackin violated the Act. However, he also found "some" level of discipline was appropriate.

Respondent denies that any actions it took were in violation of the National Labor Relations Act. Respondent continues to assert that regardless of his protected activity, Sackin would still have received the suspension.

Although Sackin's subsequent layoff was clearly related to the issues addressed in Case No. 28-CA-22818,[1] the National Labor Relations Board (hereinafter "the Board") chose not to reopen the record and consolidate this matter with the previous case. Rather, the Board chose to proceed with this matter on an independent basis. A hearing was therefore held before Administrative Law Judge John J. McCarrick (hereinafter "the ALJ") in Las Vegas, Nevada, on March 8, 2011. A single transcript volume containing the statements presented during the hearing was prepared and transmitted to the parties on or about March 18, 2011.

Gregory J. Kamer, Esq. and Bryan J. Cohen, Esq. of the law firm of Kamer Zucker Abbott, represented Wynn Las Vegas, LLC. Mara-Louise Anzalone, Esq. served as Counsel for the General Counsel of the National Labor Relations Board. Despite the presence of potential witnesses and numerous documentary pieces of evidence, the ALJ refused to allow Respondent to present any testimony or evidence in support of its case. Respondent contends such decision was in error. Inasmuch as the ALJ indicated he would take judicial notice of the record in Case No. 28-CA-22818, references are made in this brief to the prior record, noting the party testifying, the page of testimony in the transcript, and the relevant transcript lines referenced, e.g., (Westbrook: TR 671, ll. 21-22). There are also references to Respondent's Rejected

[1] All employees that received any discipline were selected first for layoff, followed subsequently by employees with no active discipline.

Exhibits (Rej. Ex.), as well as Respondent's Exhibits (R. Ex.), General Counsel's Exhibits (GC. Ex.), and Joint Exhibits (J. Ex.) from the prior case.

On July 26, 2011, the ALJ rendered his decision and the case was transferred to the Board on that day.

II. STATEMENT OF ISSUES.

1. Whether the ALJ erred by refusing to allow Respondent to present evidence in support of its case, thereby denying Respondent its due process rights? See Exception No. 4.

2. Whether the ALJ erred in finding that the layoff of David Sackin violated Section 8(a)(1) and (3) of the Act? The following exceptions relate to the ALJ's findings and conclusions in this regard: Exception Nos. 3, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.

III. STATEMENT OF FACTS.

As the ALJ refused to allow Respondent to present evidence, the following statement of facts is based upon the evidence and testimony submitted in the previous and related case, Case No. 28-CA-22818, and the evidence rejected in the instant matter, Case No. 28-CA-23070.

A. Mr. Sackin's August 21, 2009 Discipline.

The sequence of events leading up to Sackin's discipline is uncontroverted. Although discussed in the prior matter, the facts are set forth herein to provide the necessary background to provide a frame of reference for the matter at issue.

On or about August 21, 2009, Encore[2] Casino Manager Justin Sprague observed Sackin traveling on foot northbound on Las Vegas Boulevard across the street from the main entrance of Wynn. (Sprague: TR 640, ll. 5-7) Mr. Sprague was in his car traveling southbound on Las

[2] In December 2008, Wynn opened an addition to its hotel and casino called "Encore." Encore is an additional hotel and casino tower located on the Wynn Las Vegas campus and is operated entirely by the same management personnel. Encore Table Games Department employees do not have a bargaining unit, and they are not part of the unit at Wynn.

Vegas Boulevard. Id. Mr. Sprague recognized Sackin as the two of them had worked together at Wynn. (Sprague: TR 640, ll. 12-14) Mr. Sprague realized that Sackin would be late for his shift as it was 11:55 a.m. and the day shift started at 12 noon. (Sprague: TR 640, l.25 – 641, l. 7) In fact, day shift dealers are required to clock in by 11:55 a.m. (Collura: TR 69, l. 12) Accordingly, Mr. Sprague contacted the casino manager on duty to inform him that one of the dealers was running late. (Sprague: TR 640, ll. 17-18)

Peggy Collura, Wynn's Assistant Casino Administration Manager, testified about the sequence of events after the call was received from Mr. Sprague. She explained that Bill Price, the Scheduling Manager, had received the call from Mr. Sprague indicating that Sackin was going to be late because he was seen running across Las Vegas Boulevard. (Collura: TR 72, ll. 18-25) Mr. Price contacted a Casino Service Team Lead ("CSTL") in the section of the casino where Sackin was assigned to let them know that they would be short one dealer. Id. The CSTL, however, indicated that Sackin was on his game. Id. When Ms. Collura was informed of the sequence of events, she could not determine how Sackin got to his game so quickly after being out on Las Vegas Boulevard. (Collura: TR 73, ll. 6-8) Ms. Collura first checked to see if Sackin had clocked in for work, which he had not. (Collura: TR 73, l. 21 – 74, l. 1) Ms. Collura then contacted William Westbrook, Wynn's Director of Casino Administration, who directed that the surveillance footage be reviewed to determine how Sackin got to his game so quickly. (Collura: TR 74, ll. 7-10)

How, in fact, Sackin got to his game so quickly is not in dispute. The video evidence submitted clearly depicts Sackin entering the casino through the guest entrance into Wynn's shopping Esplanade off of Las Vegas Boulevard – a prohibited act. (R. Ex. 5) He then proceeded to sprint down the retail corridor toward the casino area, run down the walkway by the

table games, cross between gaming areas, drop off something he was carrying by an ATM machine, and eventually enter the pit between the tables, a series of further rule infractions. Id. Mr. Westbrook narrated the sequence of events in his testimony, noting Sackin "entering through the wrong entrance" with his shirt and vest unbuttoned. (Westbrook: TR 679, ll. 5-7) The time on the video at the time Sackin enters the property is 11:58:05, less than two (2) minutes before the start of his shift. (R. Ex. 5) Mr. Westbrook continued by explaining that Sackin ran through the retail promenade, slowing for a moment to button his shirt and vest. (Westbrook: TR 679, ll. 7-10) Upon entering the casino area, Sackin diverted from his path to the table games to deposit whatever he was carrying behind an ATM machine. (Westbrook: TR 679, l. 21 – 680, l. 3) Sackin then entered the gaming pit in the middle, between two tables, rather than at the end of the pit, shifted another dealer out of his way and ultimately arrived at his table. (Westbrook: TR 680, ll. 5-9)

Wynn's policies require that employees enter and exit the property through the designated employee entrance, which is on the opposite side of the building from where Sackin entered. (J. Ex. 11) The policies also require that employees be in full uniform when on the casino floor. (R. Ex. 6 at 12, 19, 30-31) Employees are further required to clock in downstairs in the designated employee areas. (R. Ex. 6 at 84-85, 110) (After the issuance of the written policy, the time clocks in the pits were removed, requiring the employees to clock in and out downstairs.) As Ms. Collura testified, because Sackin entered through the guest entrance and not the employee entrance, he failed to clock in on that date. (Collura: TR 73, l. 21 – 74, l. 1)

That same day, Sackin was called into a meeting with Ms. Collura and Tyrone Lancaster, Wynn's Assistant Casino Manager – Operations, to discuss the incident. (Collura: TR 81, ll. 2-5; 82, ll. 4-13) Ms. Collura asked Sackin where he had parked, to which Sackin replied that he had

been dropped off on the corner by a friend. (Collura: TR 82, l. 18 – 83, l. 2) Sackin was then given an opportunity to complete an employee statement. (Collura: TR 83, ll. 7-15) Sackin was informed that he was being suspended pending the results of the investigation of the incident and that he would be contacted on Monday, as the incident had occurred on Friday. (Collura: TR 79, ll. 4-12; GC. Ex. 3) Ms. Collura explained that the purpose of the suspension pending investigation is to give the company an opportunity to conduct an investigation, ascertain what actually occurred, and make a determination of the level of discipline to impose, if any. (Collura: TR 79, ll. 8-22) Mr. Westbrook testified that one of the outcomes of a suspension pending investigation is that the employee is returned to work with compensation. (Westbrook: TR 170, l. 20 – 171, l. 14) Accordingly, the fact that Sackin was suspended pending investigation did not mean at that time that his ultimate discipline would include a suspension. The suspension pending investigation is only a preliminary step in the investigatory and disciplinary process.

On August 26, 2009, Sackin met with Mr. Westbrook and Ms. Collura to discuss the results of the company's investigation up to that point in time. (Collura: TR 80, ll. 2-6) This meeting was actually delayed because Wynn could not get in touch with Sackin due to his failing to maintain updated contact information. As Ms. Collura testified, Sackin called Wynn on Tuesday, August 25, and Sackin was told that they had been attempting to contact him about scheduling a meeting. (Collura: TR 85, l. 25 – 86, l. 4) Sackin had been at the dentist, but still came in that day for the meeting. (Collura: TR 86, ll. 4-8) However, Sackin's employee representative of choice was not available that day, so the meeting was postponed until the following day. (Collura: TR 86, ll. 8-10)

During the meeting on August 26, 2009, Sackin was asked if there was any more information he could provide regarding the incident that had taken place on August 21, and whether he knew that he had violated company policies. (Collura: TR 86, l. 17 – 87, l. 11) Sackin subsequently wrote an addendum to his original employee statement. (Collura: TR 87, ll. 18-19) Mr. Westbrook explained that he would review all of the evidence, determine if any other employees had committed similar offenses, and then determine the level of discipline to impose. (Westbrook: TR 180, ll. 7-14)

It was ultimately determined that Sackin committed the following policy violations: 1) failure to notify a Casino Manager of his late arrival; 2) entry through an unauthorized entrance; 3) not in complete dress uniform in the casino area; 4) running in a guest area; 5) leaving personal property on the floor in the casino area; 6) crossing through gaming areas instead of using the main aisles; 7) entering the pit from the side, not at the end; 8) pushing a co-worker; 9) not clocking in; 10) failure to sign the "Clock In/Out Problem Log;" and 11) failing to maintain current contact information with Human Resources and the table games department. (GC. Ex. 2; Rej. Ex. 7) Mr. Westbrook explained that the decision was made to return Sackin to work with a disciplinary suspension for the time served, without compensation, and to issue him a second, last and final warning.[3] (Westbrook: TR 183, ll. 11-13) Mr. Westbrook testified that all of the numerous violations that accumulated during Sackin's infraction justified his receipt of a five-day suspension and a second, last and final warning. (Westbrook: TR 675, ll. 1-5) As Ms. Collura testified, this was the first time a Table Games Department employee was ever caught using the wrong entrance, and then running through the casino floor. (Collura: TR 87, l. 23 – 88,

[3] A second, last and final warning denotes the severity of the infraction and not the fact that it is a "second" warning. Indeed, this was the only active discipline in Sackin's personnel file.

l. 5) Additionally, there was no evidence that any other employee had ever committed so many individual rule violations in just a several minute span of time.

B. Wynn's Reduction in Staff.

Due to the trying global economic conditions, in early 2010, Wynn determined that it needed to make economic changes to the terms and conditions of employment for all of its employees, including the table games dealers. At that time, Wynn was engaged in the negotiation of its first collective bargaining agreement with the Transport Workers Union of America ("TWU"), who represented a bargaining unit of table games dealers, excluding steady extra dealers, CSTLs, supervisors, managers, guards, and clerical employees. On November 17, 2009, the parties had reached a comprehensive tentative agreement on all terms of the collective bargaining agreement, with the exception of the duration of the agreement. (R. Ex. 17; Collura: TR 724, ll. 11-18) Ratification of the tentative agreement had been delayed, however, by dissension among various factions of the dealers over the issue of tips. (Collura: TR 725, l. 21 – 726, l. 4) The collective bargaining agreement was subsequently ratified on November 19, 2010. (Rej. Ex. 13)

Although Wynn and the TWU had reached agreement on all of the terms and conditions of employment, the TWU had failed to submit the agreement for ratification due to the bargaining unit's internal political dissention. Accordingly, Wynn determined that it needed to unilaterally implement certain provisions of the agreement in order to effectively operate. On January 25, 2010, Wynn notified the TWU that it was implementing several articles of the tentative agreement. Namely, Wynn implemented the articles pertaining to working hours and schedules, early outs, seniority; and skills and game assignment. The TWU raised no objection

to the implementation of these provisions. The legality of this implementation and subsequent layoff procedure is not in dispute. (Jt. Ex. 1 – Joint Stipulations at 5)

On May 26, 2010, Mr. Westbrook was informed by Wynn executive management that 58 table games dealers were to be laid off. This number was provided to Table Games Administration as the number of Wynn table games dealers that averaged less than 28.5 hours per week over the quarter prior to May 26, 2010. The rationale behind the layoffs that was expressed to the Table Games Department was that by laying off this number of dealers, the remaining full-time dealers would be able to return to and maintain a full-time schedule of 40 hours per week, and prevent any forced days off.

Ultimately, 58 table games dealers were laid off on June 15, 2010. The table games dealers were laid off in accordance with the provisions of Article 12.02 of the tentative collective bargaining agreement. (R. Ex. 17, at 14-15) Accordingly, those dealers with active discipline, which included discipline from June 15, 2009 through May 25, 2010, were the first selected for layoff. Active progressive disciplines were sorted by: a) 2nd Written disciplines for Job Performance; b) 2nd Written disciplines for Attendance; c) 1st Written disciplines for Job Performance; and d) 1st Written disciplines for Attendance. Dealers with active discipline accounted for 51 of the 58 dealers selected for layoff. After all dealers with any discipline were selected for layoff, the remaining employees' classification date and then badge number was utilized to identify the additional 7 dealers to be selected for layoff, in accordance with the provisions of Article 12.02. Id. (Rej. Ex. 14)

Even though the tentative agreement between Wynn and the TWU allowed the Table Games Department to use skills as a deciding factor, Wynn did not exercise that privilege and

relied solely on the active progressive discipline report from Human Resources, the employee classification date, and, if all other factors were the same, the employee badge number.

At the time of the reduction in staff on June 15, 2010, Sackin had active discipline in his file. Accordingly, he was selected for the layoff. (Rej. Ex. 15) Notably, the procedure by which Wynn selected employees for layoff was not alleged by the General Counsel to have been discriminatory. (Jt. Ex. 1 – Joint Stipulation No. 5)

Between August 2010 and December 2010, table games dealer positions at Wynn began to become available. Accordingly, the 58 dealers on layoff were sequentially recalled to work in the reverse order by which they were laid off, taking into account the skill set necessary for the open position. (Rej. Ex. 14) Sackin was subsequently recalled to work on November 30, 2010. (Rej. Ex. 16) The General Counsel did not allege that the procedure by which table games dealers were recalled was discriminatory. (Jt. Ex. 1 – Joint Stipulation No. 6)

C. Wynn's Disciplinary Practices.

Had Respondent been permitted to present evidence, it would have presented the testimony of William Westbrook, Wynn's Director of Casino Administration, to discuss Wynn's disciplinary practices, as it had done in the prior matter. The testimony of Mr. Westbrook would have revealed that Wynn had serious problems in the Table Games Department with the application of its policies prior to his entry into the department in late April or early May of 2006. (Westbrook: TR 671, ll. 21-22) "[T]here was a lack of consistent [] application, there was a weakness in the policies and the way they were formulated and the way they were applied." (Westbrook: TR 672, ll. 16-18) Mr. Westbrook would also have testified that the "hold" percentage, which is the profitability percentage of the Table Games Department, was very low. (Westbrook: TR 672, l. 19 – 673, l. 7) It was determined that the low hold percentage was

attributable to the lack of consistency in the application of Wynn's policies toward the casino dealers, the integrity of the games, and how the casino dealers were being managed. (Westbrook: TR 673, ll. 10-14)

Mr. Westbrook would have explained that prior to his entry into the department, the level of discipline of Wynn's Table Games dealers was "significantly lower." (Westbrook: TR 673, l. 23 – 674, l. 3) This was evidenced in the prior matter by a report showing all of the discipline issued in Wynn's Table Games Department over the five (5) years since the property opened. (R. Ex. 14) As the report indicated, out of the nearly one thousand (1,000) disciplinary actions issued since opening, only ***twelve (12)*** non-attendance-based disciplinary actions were issued against Table Games dealers prior to May 2006. Id. Clearly, Wynn's policies and procedures in its Table Games Department were not being enforced during the first year the property was open.

In disciplinary matters, Wynn strives to follow a progressive discipline model. (GC. Ex. 7) The levels of progressive discipline include: 1) First written counseling; 2) Second written counseling – last and final; and 3) Suspension pending review, which will result in either termination or return to work. Id. Wynn's policy on progressive discipline notes: "Management reserves the right to consider individual circumstances and may administer progressive disciplinary action accordingly. *This includes the right to omit one or more steps of progressive discipline.*" Id. [emphasis added] Notably, the collective bargaining agreement entered into between Wynn and the TWU provides that Wynn may discipline for any actions occurring on the casino floor without just cause: "The Employer shall have full discretion in determining if a deficiency or misconduct exists or has occurred under these matters and the degree of discipline that will be imposed provided that such determination is not arbitrary or capricious. *There shall be no requirement, express or implied, of progressive discipline for discipline arising under this*

Article 16.01." (Rej. Ex. 13 at 19-20) [emphasis added] Additionally, the agreement between the TWU and Wynn provides that such disciplinary action is not subject to arbitration. Id.

Mr. Westbrook would have testified that he oversees all the discipline in the Table Games Department. (Westbrook: TR 165, ll. 12-15) He would have testified that an employee may be suspended while an investigation into the infraction is conducted. (Westbrook: TR 170, ll. 11-13) There are several outcomes of this "suspension pending investigation:" 1) the employee is brought back to work, made whole economically, and receives no disciplinary record; 2) the employee is brought back to work, made whole economically, but receives a written disciplinary action; 3) the employee is brought back to work, but the suspension is converted to a disciplinary suspension, and written discipline is issued; or 4) the employee is terminated. (Westbrook: TR 170, l. 20 – 171, l. 14)

D. Judge Kennedy's Decision.

On December 14, 2010, Judge Kennedy issued his decision in Case No. 28-CA-22818. As noted above, Sackin's layoff and subsequent recall was **NOT** part of the record before Judge Kennedy. Accordingly, Judge Kennedy did **NOT** have the ability nor any reason to take into account Wynn's lawful procedure by which it implemented the reduction in staff. There was no reason for him to specifically evaluate whether any form of discipline was appropriate.

In his decision, Judge Kennedy found that the level of discipline imposed on Sackin – a five-day suspension and notification that this was a last and final disciplinary action – violated Sections 8(a)(1) and 8(a)(3) of the Act. Judge Kennedy, however, made several statements in his decision that left questions unanswered as it pertains to the present matter. Specifically, Judge Kennedy stated:

> . . . [H]e broke some minor rules. In that sense, ***some admonishment or counseling was appropriate*** . . . . Yet, Respondent chose to suspend Sackin and

> skip lesser disciplines, jumping him from admonishment to a second last and final written warning, the last step short of firing him.

Wynn Las Vegas, LLC, Case No. 22-CA-22818, JD(SF)-52-10 at 15 (Kennedy Dec. 14, 2010) [emphasis added]. Inasmuch as there was no need to evaluate whether any form of discipline should have issued as the layoff had not occurred at the time of the proceeding, the record before Judge Kennedy was silent on the issue. As a result, Judge Kennedy did not have the benefit of knowing that the precise level of discipline imposed upon Sackin would be of critical relevance in a future proceeding. Contrary to the Judge McCarrick's finding in the instant matter, Judge Kennedy's comments in his decision clearly indicate that Wynn would have been justified in issuing some level of discipline against Sackin. His ruling found only that the *level of discipline* imposed upon Sackin was discriminatory. No discussion of the need for or possibility of lesser discipline was ever presented to Judge Kennedy. Judge McCarrick, therefore, incorrectly concluded that the level of discipline was litigated in the prior matter and that Respondent sought to relitigate the issue before him. To the contrary, the issue as to whether any imposition of discipline would have been lawful was not litigated and is still unresolved.

Exceptions and Cross-exceptions to Judge Kennedy's decision are currently pending before the Board.

IV. ARGUMENT.

A. Refusing to Take Evidence Violated Wynn's Due Process Rights.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and *afford them an opportunity to present their objections*." Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) [emphasis added]; see also Earthgrains Co., 351 N.L.R.B. 733, 735 (2007) (citing Lamar Advertising of

Hartford, 343 N.L.R.B. 261, 265 (2004)). The Administrative Procedure Act provides, in relevant part:

> (c) The agency shall give all interested parties opportunity for--
> (1) *the submission and consideration of facts*, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit.

5 U.S.C. § 554 [emphasis added]. The Board similarly follows such considerations:

> The [due process] factors to be considered can be summarized as follows[:] prior notice and an opportunity to be heard, timely recital of the matters of law and fact asserted, and *a fair opportunity for a defense to be prepared and litigated.* If these elements are lacking, the Board may not find a violation or take enforcement action.

King Manor Care Ctr., 308 N.L.R.B. 884, 889 (1992) (citing Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055, 1074 (1st Cir. 1981)) [emphasis added].

By merely rejecting Respondent's submission of evidence outright, the ALJ denied Respondent the opportunity to be heard, a fundamental element of due process.

B. Any Level of Discipline Would Have Resulted in Sackin's Layoff.

Had the ALJ permitted Respondent to present its evidence, he would have seen that contrary to the Counsel for the General Counsel's assertion, and his finding, Respondent was not seeking to relitigate an issue decided in a prior proceeding.

As discussed above, the issue before Judge Kennedy was whether the discipline imposed upon Sackin violated the Act, not whether Sackin should have received any discipline at all. However, in his own decision, Judge Kennedy stated that he took issue with the level of discipline imposed, not the fact that discipline was imposed: "some admonishment or counseling was appropriate." Wynn Las Vegas, LLC, Case No. 22-CA-22818, JD(SF)-52-10 at 15 (Kennedy Dec. 14, 2010). In the case before Judge Kennedy, evidence was presented to demonstrate the quantity of discipline imposed by Respondent. (R. Ex. 14) However, evidence

of a precise comparison of the discipline imposed upon other employees for similar infractions was not provided.

Because Judge Kennedy concluded that some level of discipline should have been imposed, Respondent in the instant matter needed to present comparator evidence of the specific offenses for which discipline has been issued. Had Respondent been permitted to present its evidence, the ALJ would have been able to conclude that Sackin would have been disciplined. Any form of discipline would have resulted in Sackin's selection for lay off. The selection for lay off was the penultimate issue of the instant proceeding.

Specifically, Ms. Paulyne Hauschildt, an Employee Relations Counselor at Wynn, would have testified as the custodian of records to several disciplinary events ranging from a first written warning to termination for an employee's use of the guest entrance. (Rej. Ex. 1) Ms. Hauschildt's testimony would have explained the severity of the offense of an employee using the guest entrance based upon Wynn's employment of over 12,000 employees, which would result in the chaos of millions of employee entrances and exits in any given year. (Cohen: TR 33, ll. 9-19) Such improper employee entrances interfere with guest access, is unsightly, and most importantly, is disruptive to the Company's operation. Ms. Hauschildt would have also testified to the level of discipline employees received for parking in the guest parking lot. (Rej. Ex. 2) Similarly, Mr. Westbrook would have testified to hundreds of disciplinary events from minor, singular work rule infractions in the Table Games Department that result in at least a first level of written discipline. (Rej. Exs. 8-10) These minor, singular event infractions resulting in discipline, were, by any objective standard, far less severe or attenuated than those admitted violations committed by Sackin, the most severe of which being his use of the guest entrance.

Contrary to the ALJ's findings, Respondent was not asking the ALJ to relitigate an issue previously decided. Rather, Respondent is seeking the acknowledgment of a factual finding made in the earlier case; namely, that regardless of Sackin's protected activity, some form of discipline would have issued for Sackin's multiple rule violations, and therefore Sackin would have been subjected to the layoff.

The proper analysis is for the Administrative Law Judge to determine whether the General Counsel met its burden of demonstrating that the layoff of Sackin was based on a discriminatory motive. It is well-established that the Board applies the burden-shifting framework first adopted in Wright Line, 251 N.L.R.B. 1083, 1089 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), and later endorsed by the Supreme Court in Transportation Management, 462 U.S. 393, 401-03 (1983), to determine whether an employer violated the Act by disciplining an employee. See NLRB v. Mike Yurosek & Son, Inc., 53 F.3d 261, 267 (9th Cir. 1995).

According to the Wright Line burden shifting framework, to sustain an unfair labor practice charge, the General Counsel has the burden of proving a *prima facie* case by showing that Sackin's alleged protected activity was a "substantial or motivating factor in the decision to [discipline]" him. Yurosek, 53 F.3d at 267 (quoting NLRB v. Howard Elec. Co., 873 F.2d 1287, 1290 (9th Cir. 1989)). The elements required to support a showing of discriminatory motivation are: (1) protected concerted activity, (2) employer knowledge, (3) timing, and (4) employer animus. The General Counsel must prove not only that the employer knew of his protected concerted activities, but also that the timing of the alleged reprisal was proximate to the protected activities and that there was animus to link the factors of timing and knowledge to the improper motivation. See New York University Medical Center, 324 N.L.R.B. 887, 900 (1997) (citing Hall Construction v. NLRB, 941 F.2d 684 (8th Cir. 1991) and Service Employees Local 434-B,

316 N.L.R.B. 1059, 1070 (1995)); see also United Federation of Teachers Welfare Fund, 322 N.L.R.B. 385, 392 (1996) (stating that General Counsel is required to prove the timing of the alleged reprisal was proximate to protected activities).

If such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. See Excel Corporation, 324 N.L.R.B. 416, 420 (1997); New York University Medical Center, 324 N.L.R.B. 887, 900 (1997).

Because Judge Kennedy found that the General Counsel was able to establish a *prima facie* case, the burden then shifts to the employer to demonstrate that its allegedly discriminatory actions would have been undertaken regardless of the protected conduct. Yurosek, 53 F.3d at 267 (citing Wright Line). This is clearly the case here as Respondent's layoff of Sackin was the result of discipline he received for his having engaged in irrefutable misconduct. The General Counsel stipulated that the layoff procedure and selection process was not discriminatory. (Jt. Ex. 1 – Joint Stipulations at 5) Accordingly, had Sackin received any level of discipline at all, he would have been included in the layoff. Counsel for the General Counsel has therefore failed to prove unlawful motivation in the layoff of Sackin.

The Board has held that where a discriminatee receives a level of punishment disproportionate to that received by similar employees, the violation is for the additional discipline, not the entire discipline:

> [A]n employee's status as a steward does not insulate him or her from the lawful discipline imposed upon all employees. Thus, in these circumstances, the violation directly results from the additional penalty imposed on a steward by an employer. For that violation, a proper remedy must be provided.
>
> In the Chairman's view, the remedy advocated by Member Jenkins fails to correlate with the violation found. In this case, inasmuch as the walkout was unprotected, Respondent could and did lawfully discipline those employees who

> participated in the walkout. Thus, to the extent that all electricians – including the stewards – who participated in the walkout received a 3-day suspension without pay, Respondent's discipline was lawful. However, Respondent's imposing a greater discipline upon the union stewards was unlawful, and the stewards are therefore entitled to be made whole *to the extent that their discipline exceeded that found lawful.*

Miller Brewing Co., 254 N.L.R.B. 266, 267 (1981) [emphasis added]. In Miller, two union proponents were terminated for an offense for which the rank-and-file employees received 3-day suspensions. The Board amended the remedy to "make whole the discriminatees to the extent that the discipline imposed against them *exceeded that* given to the rank-and-file." Id. at 266, n.1 [emphasis added]; see also S. Cent. Bell Tel. Co., 254 N.L.R.B. 315 (1981).

As Sackin was not part of a group of employees that received different levels of discipline, Judge Kennedy was not in a position and had no reason to reduce Sackin's discipline to that received by the rank-and-file employees. This was the task the ALJ in the instant matter should have engaged in, but chose not to by mistakenly granting Counsel for the General Counsel's Motion in Limine. Additionally, as the record before Judge Kennedy did not include the layoff, he was not privy to the knowledge that the specific imposition of discipline was relevant to Sackin's employment status. The evidence in the instant matter, had it been received, would have irrefutably demonstrated that Sackin would have at a bare minimum been given a first written warning for his undisputed multiple violations of Wynn's policies and procedures. With a single First Written Warning in his file, Sackin would still have been selected for the layoff, based upon Respondent's lawful layoff procedure. (Rej. Ex. 14)

The ALJ attempts to distinguish Miller Brewing by stating that Respondent is seeking to relitigate the lawfulness of Sackin's discipline. In Miller Brewing, the Board had the benefit of knowing the lesser form of discipline that had been imposed upon the other employees. Miller Brewing stands for the proposition that when an employee receives a discipline that is more

severe than his coworkers for a discriminatory motive, that discipline should be reduced to the level of discipline received by the coworkers. Miller Brewing Co., 254 N.L.R.B. at 266. Contrary to the ALJ's finding, Respondent was not seeking to relitigate the lawfulness of Sackin's discipline. Rather, Respondent was seeking a determination that the level of discipline Sackin would have received in the absence of a discriminatory motive should be the same as that received by other employees where union animus was not a motivating factor. Such a determination was not made in the prior case, as the specific level of discipline was not at issue. Additionally, the ALJ's conclusion that in this matter, collateral estoppel prohibits relitigating issues from the prior matter, is flawed as the issue to be litigated in the instant matter was not present in the matter before Judge Kennedy. Specifically, Counsel for the General Counsel never alleged that the *level* of discipline imposed against Sackin was discriminatory, but rather that the issuance of discipline at all was discriminatory. Had Counsel for the General Counsel asserted that Sackin should have received a lesser form of discipline, then such issue would have been litigated in the prior matter. That was simply not the case. Respondent reiterates that Counsel for the General Counsel chose not to consolidate these matters and reopen the record to address the instant matter in the prior case. Rather, Counsel for the General Counsel issued a separate Complaint and sought to litigate this matter independently of the prior case. Accordingly, contrary to the ALJ's finding, this issue was not litigated before Judge Kennedy as a result of a decision by Counsel for the General Counsel. If Counsel for the General Counsel chooses to issue a complaint in a second case asserting a new issue, then Respondent must be permitted to present evidence and litigate that issue.

Respondent continues to assert that the discipline imposed upon Sackin was not discriminatory. However, assuming *arguendo* that Judge Kennedy's finding that the discipline

imposed was discriminatory is upheld, the issue as to whether Sackin's layoff was discriminatory remains before this tribunal. The parties stipulated that the layoff procedure imposed by Wynn was not discriminatory. Thus, were Sackin to have any disciplinary event in his file at the time of layoff, he would have been subject to the layoff. Inasmuch as Judge Kennedy concluded that Sackin should have been disciplined, and the evidence, had it been received, would have concluded that such level of discipline would at a minimum have been a First Written Warning, the first disciplinary step, including Sackin in the layoff was not discriminatory. To remove all discipline for admitted and proven wrongdoings by the union steward is to directly contradict the holding of Miller, and Section 10(c) of the Act. See 29 U.S.C. § 160(c) ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for cause.").

Accordingly, Wynn has demonstrated that the layoff of Sackin on June 15, 2010 was not a violation of Section 8(a)(3) of the Act.

V. CONCLUSION.

The ALJ erred by refusing to permit Respondent to present evidence in this matter. Contrary to the ALJ's finding, Judge Kennedy left open the issue as to what level of discipline Sackin should have received. Had the ALJ permitted the presentation of evidence, he would have concluded that at the very least, Sackin would have received a minimal amount of discipline for his admitted policy and procedural violations. This minimal level of discipline would have resulted in Sackin's inclusion in the irrefutably valid layoff selection process. As such, the layoff of Sackin was not a violation of the Act.

Accordingly, Respondent respectfully requests that the ALJ's recommended Order and Remedy be rejected

DATED this 6th day of September, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 6th day of September, 2011, the undersigned, an employee of Kamer Zucker Abbott, electronically filed the foregoing Respondent Wynn Las Vegas, LLC's Brief in Support of Exceptions to the Decision of the Administrative Law Judge, via the National Labor Relations Board E-Gov Electronic Filing system, and placed a copy of the Brief in the United States mail, postage prepaid, and addressed as follows:

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